

2.

A Briefe DECLARATION

For

VVhat manner of speciall Nusance
concerning private dwelling Houses,
a man may have his remedy by Assise,
or other Action as the Case
requires.

Vnfolded in the Arguments, and
opinions of foure famous Sages of the Com-
mon Law; together with the power, and extent of
customes in Cities, Townes, and Corporations, con-
cerning the same: together with the determi-
nation of the Law, concerning the commodity, and
use of Houses, and their appurtenances.

Whereunto is added,

*The Justices of Assise their Opinion, concerning
Statute law for Parishes, and the power of Justices of Peace,
Churchewardens, and Constables; and to know what they
are to doe concerning Bastards borne in their Parishes,
relief of the Poore, and providing for poore
Children, what remedy for the same.*

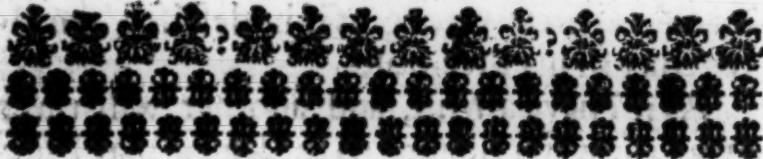
L O N D O N ,

Printed for W I L L I A M C O O K E, and are to be
sold at his shope, neare Furnivals-Inne gate in
Holbourne. 1636.

ДЕСЯТЬ ДЕСЯТЫХ

A physical model of the sun
which is 1000 times larger
than the sun, and 1000 times
hotter, is now being built at
the University of California
at Berkeley. The model
will be used to study the
physics of the sun and other
stars. The model will be
completed in about 10 years.

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The Arguments, and opinions of four famous Sages of the Common Law touching the power, and extent of customes of Cities, Townes, Corporations, and Inheritances, together with the determination of the Law concerning the commodity, and use of Houses with their appurtenances, and wherein an action may be maintaineable concerning the same, and wherein not.



Man hath a house, and the *Mr. Mounsons* windows thereof open into ^{argument.} an others mans house, whether hee may build a house, so as to stoppe up the same lights, or not : concerning which, I purpose to shew you my opinion, and likewise to shew unto you the necessity and use of Houses.

The first, and chiefe use of an house is to defend man from the extremity of the winde, and weather. And by the receipt of comfortable light, and wholsome ayre, into the same to preserve mans body in health.

Therefore who so taketh from man so great a commodity as that which preserveth mans health in his castle, or house, doth in a man-

manner as great wrong as if he deseised him altogether of his Free-hold.

As if I have a Mill, and another will turne away the water running to the same, I may bring an Assise against him.

So, if I have a Pipe, which conveyeth water unto my house through the ground of another man, and he will cut my pipe, I shall have an action against him : In like manner who so stoppeth my light, is the cause that no ayre can enter into my house, without which no man can live, and a house lacking light, is rather a dungeon then a house.

If one who hath a horrible sicknesse be in my house, and will not depart, an action will lye against him, and yet he taketh not any aire from me, but infecteth that which I have.

So if one cast filth neere unto my house, I may bring my action against him. If a man build so high that his house droppeth on my house, I shall have remedy against him.

And though light and ayre be common, yet if by any mans owne act they may bee made private, they may not then bee taken from him, and if they be, he shall not bee without remedy.

This appeareth by Hawkes, and Deere, which be *fera natura*, yet if by mans industry they are madetame, the owner will thereby gaine property in them: but peradventure it will bee sayd, The soyle is his owne, and it is *Damnum absq;*

abſq; *injuria*, what then : though it be his owne, he must loſe it, that hee hurt not his Neighbour.

As if a man had a Pond of water, and will ſuffer it to drowne his neighbours land, he ſhall have remedy againſt him.

If a man be bound to repaire the bankes of the ſea that it drowne not the land adjoyning, and ſo doth not, but the land is drowned ; an action lyeth againſt him. You may perhaps ſay there is plenty of light remaining, this notwithstanding our action will lye very well, for the taking away, or impaſſing part thereof. As an action was brought, *quare ardetavit*, and 2. H. 4. where a man had a way and another plowed the ſame, and it was thought there that an action would very well lie, and yet the way remained. If I have common in your Land, and you will plough part of the ſame Land, I ſhall very well maintaine an action againſt you. So it is of Common of Eſtovers, and pifcary: And yet in all theſe caſes, the whole is not gone, but ſome part remaineth. This proveth that though he hath not ſtopped the whole light of the house, yet for that he hath ſtopped parcell, an action is very well maintainable, but if you had ſaid, that on the ſame ſide there had beene plenty of light, it might have better ſtood with reaſon.

As touching your cuſtome, whereby a man may ſtoppe his neighbours lights : I thiak this

is rather *malus usus*, then any custome: for as I have learned of Mr. Hales, a custome is thus defined, *Consuetudo est jus non scriptum nunquam repugnans rationi naturali*, and therefore if any custome swerve from reason, and naturall equity, it is but *malus usus*; and for that to bee abolished, for by entendment, and consideration of the law, and reason, every custome had a reasonable beginning, as that case in 35. H. 6. of selling Jewels in Cheapside may have a reasonable beginning. In like manner the custome of *Gavelkinde*, that Sonnes shall equally inherit the Lands of their Fathers. Such is the custome, that if a woman marrie without licence, that she shall loose her dowrie.

So is it also of the custome that one towne may enter Common with another. All these, and such like may well bee thought to have a reasonable beginning.

Otherwise it is, where by intendment their beginning cannot be thought reasonable.

As that a man shall pay relief, when that hee shall marry his daughter. And as the custome is in Mich. 35. H. 6. fol. 31. of the pledging of goods: So it is of the custome, to arrest a man before the day of payment. In like sort in 2. H. 4. that the tenant shal not put his beasts into the Common, before the Lord hath put in his, which peradventure hee will never doe, so it is 10. H. 6. If the Major of a towne will prescribe to impound all beasts which shall bee damage

dammage fesonet in his owne pound, and there to keepe them till he bee satisfied as he list, or if he prescribe to use, and occupie the same boastes how soever he pleaserth.

In 2. R. 3. and 22. E. 4. one demanded whether it were a good custome, that if the Mayor of a towne suspect a man, that hee may arrest and imprison him 3. dayes: this was thought no good custome, but to be most abhoring, and dissonant from reason. And therefore forasmuch as houses bee necessary, and cannot bee without light, and ayre, their beginning was lawfull, necessary, and reasonable, but that a man might stoppe up his neighbours lights, was never necessary, neyther had lawfull, or reasonable beginning, neyther at any time obtained the force of a law, or custome, for in K. Henry the 2. his time, it was but a constitution in *London*, and not any custome, or law; and therefore never allowed, or confirmed by Parliament, for *Magna Charta* Ca. 9. did confirme such old liberties and customes as *London* had at that time: And therefore, if this were not any law or custome at the time of the making of that Statute, it neyther was nor could bee confirmed by the same, for the more generall Statutes shall have a reasonable construction. As the Statute that doth prohibite maintenance, shall have a construction, for lawfull maintenance is not thereby prohibited. The like law is that where it is sayd, that a fine shall bee a Barre to a *feme covert*,

coverte, this is to be understood of a good, and lawfull fine, so this confirmation by Parliament of customes, and liberties of London, shall bee intended a confirmation of all their good, and lawfull customes, and not of unreasonable, or wrongfull usage, such as in 27. H. 6. if the house of tenant for terme of yeeres decay, that then he shall pay no rent, &c. But if your custome were then good, and so confirmed by Parliament, yet the words thereof may not bee stretched to our case, the words are *visus feni-
braram*, and the Civill law sayth, a man may *estop visum*, and not *lumen*, *Lumen est descendens de
caelo, visus est mens prospectus ad terram.*

And our law sayth, *petit visum terrae*, And *visus* and *lumen* differ. But Sir you cannot in this case defend your selfe both by the Common law and custome too. For you ought absolutely to trust to the one of them, and if you had plead thus by way of Barre, your plea without all doubt would have beeene double.

As if a man will pleade affeasement with warrenty, and rely not on the warrenty, this plea is double. So in the case at the Barre, you plead both the common Law, and the custome, and your plea is double, and therefore for all these causes I thinke the plaintiff ought to recover.

Mr. Plowden.

Mr. Plowdens
Argument.

Albeit it hath beeene alleged, that the windows

dowres have beeene time out of memory there, and the lights ancient, it is all one, as if the house had beeene Built at this day. But the case there is a pale betwixt your ground and mine, and you build to the uttermost part of mine, by your first building I am bridled and kept of my building; And in the Country who so maketh a hedge, will make a dike in the uttermost part upon his owne land. So hee that maketh a Parke, will leave gfound out of the same compasse without the pale for his Keeper to walke about it, for there hee may better heare if any body bee there within, then if he were within himselfe, And this is called free-bownd. If a man buiuld his house so high that it droppeth on mine, an action will very well lyce, for there is a manifest hurt, and wrong done unto me: but 22. H. 6. where the Prior of St. Edes had three Mills, an other man built an other by them, hee could not have any remedy for this. But if any of his tenants which held of him by grinding at his Mill grinde at the new Mill, the Prior may have an action against him, for hee whose the land is, might use the same for his greatest commodity, and gaiac.

If a man cut downe Trees which fall upon an other mans land, hee shall have his action; otherwise it is, if a Tree fall by reason of wind. So in our case: of our owne soyle we may make the best, as in 12. H. 8. a man had a pond, and let the same runne out, whereby the next dwellers

land was drowned, this was but *damnum absque iniuria*, wherein, wherefore no action would lie. In 4. R. 2. a man had a Lime-tree which defoliated the Fruit of his neighbour, who maintained his action a fortiori that case this taketh place, *Si
miser est omnis etenim non latet*. And Mr. Rayall saith in his books, if a man have a Dye-house, and the water, which runneth in his house, killeth the Fish of another, an action lyeth. If a man cast fish under my walls, I may punish him for it. And in the 4. E. 3. The Prior of Buckminster had a Swife, whereby Salmones came in, and out, stopped the same, wherefore hee had his action. Like whereas one cutteth away the water, which runneth to my Mill, for the proose whereof Mr. Rayall put a case out of 19. E. 3. where an Aule was brought for two things, one because hee had levied a house to stop the light, another, because he could not repaire the same: There it was thought that no action would lye, because hee might have remayned this in abeyance ginning when hee built his house. And the case was in 7. Edm. 3. in the last point, and there the Lawyer layd, that hee might have left space enough in his owne Land, and the party was non-sued. Hermonds report hath two verses,

Super recordare si debes edificare

Vis poteris statu' circumdatu' vis reparare.

But you ayde your selfe with a prescription
that

that you have had a light time out of mind, this is no good prescription, for a prescription must be against some party. But this is against God; You say further, that the other had no house, which is not good, for a prescription must be in the affirmative, and this is in the negative, which do sayth *Reverend* in 220 H. 6. that he should not dare to prescribe in the tree having a house. But admitting it to be the usage, this is now very bad, so much
An usage is generally, and a constitution speciall in 12. E. 4. And diversly is talan betweene usages, and custome; for custome & usage is nothing disagreeing from the same, and all aboute necessary, & also it would not be beautifull that Cities should have any voyd places in them, and it would be most inconuenient that they shoulld be populous. And therofte it was there a Statute made 37. H. 8. cap. 1. that there shoulld not be any voyd places in divers Cities, also houses are necessary for the sustenance of man; in 12. E. 4. there is a custome that if a man plough his Land, hee might wytch his plough upon an other mans land: and this was thought a good custome for the trayour of Village; which an east of Buildinges is to be trayoured. In 12. E. 4. the custome is, that a Fish-man may drive stakes into an other mans ground to doe his Nets, which was alledged for a very good custome. Likewise in 12. E. 4. odre prescribod that when that Hay was carryed out of a cartinge Meadow, that he shoulde occupy the land untill our Lady day, which was allowed by the Court. So a man

may prescribe to have Common of chovets in another man's Land; and in chovets down himself. The Lord in ancient timesme prescribed, that if the villainie of another, Lord remained a yere and a day in ancient demesme, that then it shall be lawfull for his Lord to take him from thence. In this maner one may prescribe to have grall in any Land, and all these customes stand very well with reason. If I have a wylly land and another man plow up the same, I cannot have an action on my case, but I must have an action and sue in the booke in s. d. 1. 20. Mr. Flesher sayeth that all customes must stand with reason. And for the 2. y. it is saydy, that albeit all customes are confirmed, yet they must be examined, by the rule of reason, as the custome of *Ex-
willehds* standeth with reason. The Statute that giveth a writ of rauishment, & *Lord* to *Guardian* in foggage shall be extended to the Mayor, and Aldermen of *London*, to give them like remedy which was confirmed by 1. E. 3. Also the Statute that no man shall give lands in Mortmaine, yet *Citizens* and *Freemen* of *London* may give lands in Mortmaine by their custome, which custome is also confirmed by act of Parliament. As for the doublenesse of the plea I will not say anything, for that it is not any Iustification, but only for to diminish the damage, if perhaps it bee found against us. And therfore upon the whole matter, I thinke the plaintiffe ought not to recover in this action. I thinke the contrary, and first I will consider these four things.

First,

First, whether such buildings, ~~ex opposito~~, be a Mr. Wrayes
nuisance by the Common law. Argument.

Secondly, whether this custome be a good custome.

Thirdly, whether such kinde of buildings be for the beautifying of the City.

Fourthly, whether the sayd confirmation by Parliament make this custome good, or not.

As touching the first matter, the nuisance which is supposed to be in stopping up of windows in the South part of an house, I conceive is a nuisance by the Common law, for by the Common law, one shall not hurt the Freehold of another, and no greater hurt, grievance, or damage can be done to any man's Freehold, then to take away the light and ayre thereof, which is comfortable, & commodious for him, for when this light, and ayre are taken from him, his house remaineth as a dungeon. And divers cases there bee where a man taketh away from an other not the thing it selfe, but the commodity of the thing, and for that he shall have his remedy by action: as if I have a water running through your ground unto my Mill, and you will turne away the course thereof, or stop the same, I may bring an assise 9. E. 3. pl. 19. yet I will confess, that if an other build a Mill by my Mill, I may not have any action, as 22. H. 6. for it is *damnum absque injuria*. So it is in 2. H. 4. in the case of the Schoole *cadem ratio*. But if any ought to grinde at my

Mill, and another will hinde them, in action lyeth 9. H. 6. fo. 45, where the Bryer of
 St. Bartol had a Faire, and one interrupted the
 commers thereto, whereby his Toll was impa-
 red, and yet not his Faire, but the profit of his
 Faire taken away, and hee had remedy. So in
 our case he hath not meddled with our Freehold,
 and yet hath he hurt our Freehold. So in 4.
 E. 2. 13. E. 3. If I have a Faire, and the King
 will grant another, if my Faire bee impaired
 by this I shall have an action, and so of a Ferry,
 and the reason is, because a man is compella-
 ble to maintaine his Faire, Ferry, or Market,
 and if he doe not, it is punishable in a Leete.
 But of a Schoole, otherwise it is, for that a
 man is not bound to maintaine it, but Houses
 in Cities men are bound to maintaine, and
 that by Statute, otherwise they may incurre the
 punishment. 18. E. 3. one built his house so high
 over mine, that the raine dropped from his up-
 on mine, and it was thought there that an ac-
 tion was maintainable, yet that hurt might
 have beene atteneded *a fortiori* in our case where
 the hurt is perpetuall, and cannot be amended.
 And if for a way an action lyeth, as is in ch. 42
 E. 3. much more for an hurt to our health, which
 above all things men have regard unto, for the
 proofe whereof we have a writ in the Regesta
 de *Ignorante amovenda*. Likewise the selling of
 corrupt meate, whereby mens bodies may su-
 staine harme, is punishable in a Leete, which
 proveth

groweth that the Common law hath regard unto the health, and welfare of every private man. There is a case in 4. E. 3. lib. 11. pl. 3. where one built a Liuing kilne, and his neighbour was annoyed by the smoke thereof, and had his remedy. If a man shall be punished for smoke, which may be avoyded, and dureth but at times, what shall we thinke of the taking away of light, and ayre, which cannot be amended, but remaineth a continual and perpetuall nuisance; as for the cases in 12. E. 3. which hath bin avouched so oft to make strongly against us, I take them to be one case, for so much as the Justices which speake in one place, speake also in the other place; and last of all in both cases, the case was thus, an assise of nuisance was brought, and the Plaintiff counted how the defendant had levied a house, so that thereby his light was stopped up, and that hee could not so well come to his house as he did before, also that he could not repaire his house so well as he could before.

Herebe said, as to the light be it a nuisance, such a one as it is. *Tiel. quel.* for the repaireing none, for when a man buildeth, he must leave so much space on his owne ground that he may come to repaire his house, and if hee had thought that stoping of his light had bin no nuisance he would not have said, be it a nuisance *Tiel. quel.* but have said as he did to the other case of repaireing, it is no nuisance. And therfore for the first mauer, I thinke this to be a nuisance by the Common law.

As

As touching the second matter, whether this custome be a good custome or not, and I thinke the same is no gond custome. For *consuetudo est in, &c. ut supra*, a custome is not against law, and reason, but this custome of yours is against reason, and is in effect, as if a man should take my life from me, for these bee the instruments to maintaine, and preserve mans life, and the law layth, *sic uere tuo, si alienum non laedas*, therefore a custome against this precept, is *malus usus*, and therefore *abolendus*, as the case in 21. E. 4. If the Kings Bayliffe or any other Bayliffe distraigne Cattell, and bring them to the Lords Pound, and if the owner did not within thre dayes agree with the Lord, that then he should loose his Cattell, this was thought unreasonable and not allowed for any good custome. So in 9. H. 6. where there the Lord of a Leet would have prescribed to have all the waste ground, but hee could not, because it was against reason, that he who had nothing in the Land should have the waists. Like unto the sayd case in the 35. H. 6. fo. 31. of pledging of goods, and such is that case in 43. E. 3. where the Lord of the Manor would have prescribed, that none of his Tenants should marry their daughters without his licence; this custome was thought to bee against all equity, and reason. In 13 E. 3. in a *dum suis infra meum*, one would have prescribed, that if the Plaintiff could number 12. he might *alien* his land by the custome: this is not a reasonable custome, for

for a man may be able to number 12d. and yet not have discretion enough to alien his Land. So it is likewise against naturall reason, that one should barre me of my light, and ayre, without which I cannot live, and therefore thesethings be of necessity. Also it is against the Law that one should meddle with the Freehold of another man, unlesse it be for a Common-wealth, as 8. E. 4. where one justified the setting in of stakes for to drie his nets, and likewise in the 11. H. 2. where one brought an action for taking or driving his Hogges, the Defendant justified, because the custome of the City was, that if any mans Hogges came into the City, and upon warning given to the owners to keepe them out; if they came againe, that then they shall be forfeited. This is a reasonable custome, because Swine are beasts that may cause diseases to bee in a City, and therefore it is against the Common-wealth, in 22. E. 4. Where it is sayd, that a man may turne his plow upon another mans land, that is a good custome, for by this meane no land shall be unsowne, which is for the maintenance of Tillage, and the benefit of the Common-wealth. But this your custome is but a private custome, and not for the maintenance of the Common-wealth, and therefore is like unto the custome in 43. E. 3. that if the tenant cease to doe his custome, the Lord may enter, this custome standeth not with the Common law, neither with the Statute which pur-

teth the Lord to his *cessavis*, and giveth him not any entry. So it is to bee thought of the cu-stome in 2. H. 4. that the Tenants shall not put their beasts into the Common before the Lord hath put in his, which peradventure hee will never doe, so that the Tenants shall never have their Common. So it is if a man prescribe that the alienation of the Husband of the Lands of his Wife shall bee good without examination of her. Like law of the Custoome in 43. E. 3. that if any goods bee wayned in any manner; and if any man take them, that then it shall bee lawfull for me to distraigne, and detaine the distresse untill such time as I am satisfied: by these cases rehearsed it is manifest, and cleare that all usages against naturall reason, and the Common law of this Realme, are not customes, but evill usages, and not to be allowed. So in our case a custome to take away a mans light, and ayre, preservers of health, must needs be *malus usus*, and therefore ought to bee taken away; For good usages stand with reason, and as *Braction* sayth, must give place to reason, and law. But you will say, that the Law of your City is such: I say, if it stand not with reason, and law, it shall not bee allowed. As 10. E. 3. in an appeal brought by a Citizen, the defendant waged battaile, the Citizen said the custome of London is such, that a stranger should not wage battaile against a Citizen, this was thought no good custome, nor sufficient to deprive a man

of a benefit, which the law giveth him. And so in 27. H. 6. in an action of debt upon a lease for yeeres, the defendant sayd that the custome was, that the plaintiff should repayre the houses, and if not, that the defendant should pay no rent, this was thought to bee no custome allowable. For the third point, this is no beautifying at all to the City. In our case Mr. Hayles his house is an ancient house, and therefore against reason that by latter building, the commodity, and use of the same should bee taken away. You say also that it is a thing honourable to have buildings in Cities; This I grant, and I thinke no man will deny it: but by building of one, to impaire a better house, this is not any beautifying, or honour at all to a City, but rather the contrary. For the fourth matter, If the custome be not good, the confirmation cannot make it good: for as I take the law, the common learning is, that a confirmation cannot make a voide thing good: as for a confirmation *est firmum facere id quod non firmum fuit ante, sed fuit tamen* 26. H. 8. If an Infant grant an advouson, and at his full age confirmeth the same, by this confirmation nothing is wrought. So it is in the case of 33. E. 3. where the lease for yeeres was made by a Bishop, and he dyed before the yeeres expired, the successour confirmeth the said lease, and *nihil operatur*. Likewise in 39. H. 6. the King granted an advouson to one, and after granted the Mannor with the advouson to

another, and after the confirmation is made, yet the advouson passeth not. But where the Statute limiteth, that men may devise unto corporations in Mortmaine, yet if they will devise to any that is not a Corporation, it is without warrant: And also albeit a man may not wage his law in *London*, yet if at the Common law, an action be brought against him, hee may: So it is of the case in 20. H. 6. that if one be brought before the Sheriffe, that the Mayor may dismisse him, yet after judgement hee may not dismisse him.

Likewise 12. E. 4. where one would have prescribed to buy things without payng of tolle, that he could not be allowed. And therefore I will conclude that such customes as stand with law, and reason, are to bee allowed, and contrary such as swerve from the rules of law, and reason, to be disallowed. As this custome of yours, that a man should stop his neighbours lights is altogether unlawfull, and unreasonable, and therefore the plaintiff ought not thereby to bee barred of his action.

Mr. *Manwood*.

*Mr. Manwood's
Argument.*

Here be two matters chiefly to bee considered, whether by the Common law this bee a nuisance, to stop up part of a mans light, then if the Common law seeme to be doubtfull, whether the custome will helpe us, or not, divers cases.

cases have beeene put, when a man toucheth not the Free-hold of another, but on his owne land doth wrong unto another mans. But all these cases doe vary from our case, for they are where a man hath a private profit in a thing, and another by doing an act upon his owne land taketh away the same, wherfore an action will lie, as the case in 46 Edw. 3. where the Abbot of *Buckhurst* had Salmons, comming in at sluice from the Sea, and a stranger stopped the same, so that they could not come, and hee had his action. So it is where one taketh away my way, because this is a thing locall. And so if water running to my Mill, if one miscarry the same: generally wheresoever I have a private profit, or interest, and one barre mee of the same, it is injury: but the ayre is not any element locall, neyther may any man miscarry it, for it suffreth nothing to be voyd, also light, and ayre be not things of necessity, but of pleasure, and be not any profit in *certo loco*, and therefore not like unto other cases of things both profitable, and also necessary. The case of the Ferrie I will grant, that if I have a Ferrie to transport men, and another will erect another I shall have an action, because that I am compellable to main-taine it, and the not keeping of it, is presentable in a Leete. The same law is of the Market, where the King granteth another Market *ad nonumcium* of mine, I may have a *Scire-facias* to repeale his letters patentes if he have these words

in them, that the grant should not bee to the hurt, or prejudice of any other market; and if not, I shall have an action on my case: your case was also compared to the case in 4. E. 3. and 4. aff. pl. 3. where the *aff.* was maintained, not for that the plaintiff was annoyed by the smell of the smoke, but because his Apple-trees, and other his fruits were destroyed by the same, and this is a good reason, for that it is to his disinheritance. As for the case of the Lime-house at *Rarecliffe*, and the smoke of Smiths houses which cast many unsavoury smels, it is *damnum absq; injuria*. And I my selfe was by a Smith annoyed by the smell of his smoke, but yet might I not have any action against him. In 18. Edw. 3. one built an house so high that it dropped from his to mine, in this case an action will lye, for my tyles are thereby consumed, *gutta cavat lapidem*. So of the case in 2. H. 5. if by common assent our Houses joyne and a gutter is made betwixt us, if I plucke up my part, you may maintaine an action against mee. All these cases hitherto put, have beene of taking away a locall commodity, or else of consuming something.

The case of the filth I finde not in my booke, but in the booke of Entries, and there it was *per paries*, so that the walls were hurt thereby. But I will agree with you, that if all your windowes were stopped, that an action will lie, and where you say *sic utere tno ut alienum non ludas*, this

this is not meant of things of pleasure, but of things of profit. And here is not any part of your house consumed, but herein a let of your pleasure onely, for which your action is not maintaineable. And if I have a Windmill, and another will build another by mine, I cannot have any action against him, 11. H. 4. 7. E. 3. 22. H. 6. But otherwise it is of a Water-milne, ~~9. assar. pl. 19.~~ where one had a Watermill, and another built neere unto him, so that hee could not grinde so much as hee was wont, in this case a man may very well mainetaine his action. If I have an Inne, and another set another in the same Towne, hee is not punishable, but if hee will stop my gresse, which come to my house, I shall have remedy. If I have a Brew-house, and another build another by mine, I shall have no action. 12. H. 8. If water fall on my land, and I make a Sluice, and let it out of my land unto another mans; this is dispunishable, for every man may doe this one after another untill it come unto the River, but if it be a river, otherwise it is; For there it is in *loco certo*. If one house should not bee adjoyning unto another, it would bee a great deformity, and if *Cheapside* were so built, it would be a strange *Cheapside*. And the Civill lawes say, that two lights on the former part, and backe of an house, are sufficient. And if you make your windowes into our garden, this is a wrong done unto us, for by this meane I cannot talke with my friends

in my Garden but your servant may see what I doe, and so the wrong first began in Mr. Hales. And therefore *Non vi repellere licet.* And I S hath not consumed, or hurt any part of his house, but interrupted him of his pleasure onely. But I further affirme, that for every hurt a man may not have an action, but if a man be oftentimes hurt, he may very well have an action. As if the Lord distaineth for rent, an action lyeth not, but if he distaine so oft, that I cannot plow my land, I shall have an assise. So the Kings grant of exemption to one is good, but if it bee to divers, it is not good. But if the Common law would not helpe us, yet custome will, & whereas it hath beene sayd, that it is against naturall reason, and law, it is not so, *Consuetudo ex rationabili causa privat communem legem, and unlesse it doe privare communem legem, it is no custome.* As that an Infant of 15 yeeres age, may alien. For at this age he may consent to marriage, therefore in as great reason may he alien his lands ; and in some places any Infant of 9 yeeres may binde himselfe apprentice, which is a good custome and standeth with reason. But some customes there are that be not good, As that the tennants shall not drive their Beasts into the Common before the Lord hath put in his. So if the lessee will prescribe to surrender at his will, 7. H. 6. otherwise it is of the custome in the 14. H. 4, that the Tenant shall not alien without the presentment of the same before, this is a good custome

custome, and yet against common reason, but yet if it hath any taste or smatch of reason, it shall be allowed. As if the Lord prescribeth that the tennant shall not Common with any beasts, but those which were bred on the same land, this is good, for this will cause the tennant to breed Cattell; likewise that a *feme sole Merchant* shall sue without her husband, this is good, and yet against Common law, and reason, because the husband hereby is discharged of all such busines: therefore if a custome have any part of reason, it shall be allowed. As *s. E. 3.* that a man may make an estate to his wife during her life, and that should bee as good as an endowment *ad ostium ecclesie*. So is it of the custome of the *Isle of Man*, that to steale a Capon, or a Pigge, shall bee Felony, and not to steale a Horse, or Cow, for that the one may bee hid, the other may not. Likewise is it, that the youngest sonne shall inherit, because hee is lesse able to helpe himselfe. So is it of the custome of *Kent*, The Father to the bough, the sonne to the plow, and yet directly against the Common law. So I thinke of the case of Hogs put by Mr. *Wray*, for that in the time of pestilence it is dangerous to let them come into Citties.

This Cittie is the greatest Cittie, and most populous in this Realme, and the more populous the more honourable, & the more buildings, the more populous and honourable will it be. And

therefore Building is to bee favoured. And by this building all his light is not stopped, but parcell. And Mr. *Hales* thereby loseth no great commodity, but is restrained of a little pleasure, for which hee cannot maintain his action.

To the act of Parliament I will speake not thing, but this I will say, that if any custome bee meerly voyd of reason, it is not good. As the custome in 5. H. 7. that if the Lord distraigne the beasts of his tenants for rent, that hee may detaine them untill hee be satisfied at his pleasure; and 21. H. 7. that if any doe break the Pound he shall pay 3 l. this is a voyd, and unreasonable custome to binde an estranger, and yet by common consent of the Lord, and tennants, it is good to binde the tenants.

So if I prescribe, that if any mans Sheepe goe on my ground all the day, to have the foldage of them in the night, is a good custome, because by common entendment the owner hath *quid pro quo*. So our custome is for the maintenance of the Citty, neyther is it against the common law directly, neyther hereby any offence, or hurt is done unto Mr. *Hales*, for his House is not thereby impayred. And therefore, I think his action will not lye.

His second Arguments.

R. E. S. O.

Resolutions of the

Judges of Assises,

1633.

1. Question.



Hether the Church-wardens, and Over-seers of the poore of a Parish with assent of two Justices of the Peace, one beeing of the Quorum, may by the Statute of 43.

Elizabeth, cap. 2. or any law enforce a Parishioner of the same Parish to take a Childe of a poore parishioner of the same parish, who is not able to keepe his sayd childe, to be an apprentice?

Resol. The Statute of 43. of *Elizabeth*, which sayth, that the Church-wardens and over-seers of the parish shall put out Children to bee apprentices, necessarily imployeth, that such as are fit must receive Apprentices, and the putting out of poore Children to be apprentices is one

of the best wayes for the providing for the poor.

2. Q. If they may, then whether they must not give money with him, and who shall determine what money shall bee given with him, if the party that is to take such an apprentice, and the Church-wardens, and Overseers cannot agree thereupon?

Resol. There is no necessary that money must be given, but that must be left to the discretion of the Church-wardens, and Overseers, all circumstances of age and ability, beeing considered, and if they cannot agree with the party, then the Justices of Peace neere adjoyning, or in their default the Sessions of peace are to determine these Controversies.

3. Q. Whether a Knight, Gentleman, Clergy-man, or Yeoman, or one that is Sojourner, using husbandry, cloathing, or grafting, or the like, may be enforced to take such an apprentice?

Resol. Every man who is by calling or profession or manner of living, that entertaineth, and must have the use of other servants of the like quality, must entertaine such apprentices, wherein discretion must bee given upon due consideration of circumstances.

4. Q. Whether a wealthy man keeping few or no servants, nor wanting a servant, but living

ving privately may be enforced to take such an apprentice; if not, then whether hee may bee taxed towards the putting forth of such an apprentice?

Resol. For the receiving of such apprentices the answer may bee referred to the question next before; but out of doubt every such person must contribute to the charge, as to other charges for the provision for the poore.

5. *Qu.* Whether they may enforce a parishioner that is of one parish, to take such a childe, apprentice, that is of another parish, but within the same County or division, if the proper parish be not able to provide for the children of the same parish?

Resol. The Justices may provide Masters for them in other parishes within the same hundred; if the same hundred be not able, then out of that hundred in the rest of that County; As for other provision for the poore, which must bee at a quarter Sessions.

6. *Q.* If such a Parishioner may be enforced to take such an apprentice; and shall refuse not only to take such an apprentice; but also refuse to be bound to appeare at the next quarter Sessions, or Assizes, what shall bee done to him?

Resol. If any refuse, let such an bee bound over to the next Sessions or Assizes; if he refuse to give such bond, let him bee sent to

the Gaole, there to remaine untill hee will give such bond.

7. Q. If such a Parishioner who refuseth to take such an apprentice shall bee bound over to the Sessions for not taking such an apprentice, and when hee appeareth there, shall likewise refuse, what shall bee done to him, and what shall bee done to the Parents who refuse to suffer their Children to bee put out to bee apprentices, themselves not being able to main-taine them ?

Refol. If at the Sessions or Assizes such a one refuseth to take an apprentice and his excuse be not allowed, it is fit he bee bound to the good behaviour, and it will be a good course to indict such a refuser for a contempt, and thereupon to fine & imprison him; if he refuse to be bound to the good behaviour, let him be imprisoned untill he will; & the Kings book of orders directs that such bee bound with good sureties to appear at the Councell board, & if the Parents of such poore children refuse to suffer their children to be bound apprentices, or being bound, cause them away, themselves not beeing able to main-taine them, let them bee committed to the house of correction.

8. Q. Whether it be in the power of any generall quarter Sessions to mitigate any penalty upon a Statute Law, if the party indicted shall submit himselfe to the fine of the Court, and waive the travers ?

Refol.

8. *Refel.* If the party be convicted or confess the fault, it is not in the Power of the Court to mitigate the fine, in such cases where the Statute makes it certaine: but if the party im-
dicted protesting his Innocencie, yet *quia nullus plitare cum domino Rege* puts himselfe up into the grace of the Court, the Court may im-
pose a moderate fine, and order to forbear the
prosecution.

9. *Qu.* If any be bound to appeare at the Ses-
sions, and shall tender submission to the Court,
whether the Sessions may stay the indictment,
and mitigate the fine aforesayd upon the con-
fession of the fact?

Refel. This is answered before to the next
precedent Article.

10. *Q.* If a man be convicted for being drunk,
tipling, and keeping an unlicensed Alehouse,
or being licenced, for suffering others to re-
maine tipling in his house, or for swearing or
driving Cattell upon the Sunday contrary to
the Statute in that case provided: whether the
Justice of Peace, before whom hee was con-
victed, or any other Justice of the Peace may
discharge him of all or part of the Forfei-
ture or punishment appoynted by the Sta-
tute?

Refel. The Justices have no such power of
mitigation after conviction, where the Sta-
tute appoynts the measure of the punish-
ment.

11. Qu. Whether a Constable may upon a warrant for carrying one to the house of correction for keeping an unlicenced Alehouse upon the second conviction, break open the house wherein the party convicted is, to apprehend him?

Resol. This question is to be advised upon, it is put in generall termes and referred to bee considered in the particular where it appeareth.

12. Qu. If a woman unmarried bee hired from weeke to weeke, or from halfe yeere to halfe yeere, in one Parish, and there is gotten with child, and then goeth from thence unto another parish, where she is settled in service by the space of two or three moneths, and then discovered that she is with childe: The question is, whether shee shall be settled in the Parish where she was begotten with childe, or in the Parish where she was last settled?

Resol. The place where such a woman was lawfully settled, is the direction in this case, not where she was begotten with child.

13. Qu. If a woman-servant unmarried bee begotten with child, and then goeth out of her Mistris service, before or after it is discovered that she is with child, and the reputed father be runne away, or is not able to free the Parish: whether the Master may be enforced to provide for her till shee bee delivered, and for a moneth after?

Resol.

Resol. If the Master hath legally discharged his house of such a servant, hee is no more bound to provide for her then any other.

24. Qu. In case a Parish consist part of ancient Demeasne, and part of Guildable, an Assize is made for the relief of the maimed Souldiers, the Gaole, &c. according to the Statute of 24. Elizabeth, cap. 2. whether the tennants in ancient demesne shall contribute with the Guildable for the payment of the Assize?

Resol. The Statute doth not distinguish between the ancient Demeasne and the Guildable in these cases, *ubi lex non distinguuntur, ibi nec nos distinguimus.*

15. Q. Whether an Indictment of forceable detainer bee within the Statute of 1. Iacobi, cap. 5. and not to be removed by *Certiorari*, unless the partie Indicted first finde sureties according to that Statute, and whether the party Indicted bee to be bound in his absence to prosecute according to that Statute, and whether an Indictment of forcible entry, &c. found at a private Sessions bee to be removed by *Certiorari* without sureties, according to that Statute?

Resol. This is fittest to be left unto the Court of Kings-bench, to whose Commission, and jurisdiction this is most proper.

16. Q. If one be convicted upon the Statute of 3. Car. R. cap. 13. for driving of Cattell

on the Sunday through severall parishes; whether hee shall forfeit 20. s. to every of the sayd Parishes; or onely to one; if to one, then to which of them?

Resol. This Statute giveth the Forfeiture but of one 20. s. for one Sabbath day. Although the driving on that day bee through divers Parishes. Therefore where the action is first attached, and the distresse first taken, that parish shall have the benefit of the Forfeiture, and not the other.

17. *Qu.* If one who is under the age of 30. yeeres, and brought up in Husbandry, or a mayd-servant, or brought up in any of the arts or trades mentioned in the Statute of 5. *Elizab.* c. 4. and not enabled according to that Statute, to live at his or her owne hand, shall bee warned by two Justices of the Peace to put him or her selfe in service by a day prescribed by them, and shall not doe the same accordingly, but shall after continue living at his or her owne hand, what course shall bee taken with such a person, and how punished?

Resol. Such persons being out of service, and not having visible meanes of their owne, to maintaine themselves without their labour, and refusing to serve as an hyred servant, by the yere, may be bound over to the next Sessions or Assizes, and to be of the good behaviour in the meane time, or may be sent to the house of correction.

18. Q. Whether the taxe for the relief of the poore, upon the Statute of 43. Elizabeth, shall bee made by ability or occupation of lands, or both, and whether the visible ability in the parish where hee lives, or geatall ability wheresoever, and whether his rent received, within the Parish where hee lives shall bee accompted visible ability, and whether hee shall bee taxed of them onely and for any Rents received from other Parishioners: and what shall bee sayd visible ability?

Resol. The Land within each parish is to be taxed to the charges in the first place equally and indifferently, but there may bee an addition for the personall visible ability of the parishioner within that Parish according to good discretion, wherein if there be any mistaking, the Sessions, &c. or the Justice must judge betweene them.

19. Q. Whether shops, salt-pits, sheds, profits of a Market, &c. bee taxable to the poore as well as lands, Cole-mynes, &c. expressed in the Statute 43. Elizabeth?

Resol. All things which are reall, and a yearly Revenue, must be taxed to the poore.

20. Q. Whether the taxe for the County Stocke, Gaole, and house of Correction is to bee made by the Statute of 14. Elizabeth, cap. 43. Elizabeth: by ability, and upon the Inhabitants of the parish onely, or upon

them, or the occupiers of Lands, dwelling in that parish: or whether such as occupy lands in that parish, and dwell in another parish shall be taxed:

Resol. If the Statute in particular cases give no speciall direction, it is good discretion to goe according to the rate of taxation for the poore: but when the Statutes themselves give directions, follow that.

21. *Q.* Whether any taxes ought to be made for the charges that petty Constables and Bor-shoulders are at in conveying rogues from parish to parish, and relieving of them and how to be rated?

Resol. It is fit to relieve the Constable and Tything-men, in such sort as it hath beene used in the severall places where they live.

22. *Qu.* Whether a Justice of Peace may discharge a servant being with childe from her service, allowing that as a reasonable cause that she is thereby made unable to doe the service which otherwise she might have done; and if hee may discharge her, whether that Parish shall provide for her, till her delivery, if she cannot provide for her selfe: and so also if her time be expired before her delivery, who shall provide for her after her time ended?

Resol. If a woman being with childe procure her selfe to bee retayned with a Master who knoweth nothing thereof, is a good cause to discharge her from his service. And if shee bee

begotten with childe during her service, it is all one, but the Master in neyther case must turne away such a servant of his owne authority. But if her terme be ended, or shée lawfully discharged; the Master is not bound to provide for her, but it is a misfortune faine upon the parish, which they must beare, as in other cases of casuall impotency.

23. Qu. Whether being delivered of a bastard childe in one parish, and goeth into another with her childe; and becomes vagrant, and so is sent to the place of her birth; her bastard childe being under the age of 7. yeeres, shall bee settled with the mother, and there maintained, if the mother be not able, nor the reputed Father knowne, found: or whether it shall be sent to the place of its birth, or being settled with the mother, whether the Parish where it was borne, shall be ordered by the two next Justices to pay a weekly summe towards the maintenance of it?

Resol. The Bastard childe must bee placed with the mother, so long as it is within the quality or condition of a Nurse childe, which shall bee, till seven yeeres of age; and then it is fit to be sent to the place of its birth to bee provided for, the mother or reputed father, not being able. And the Parish where the childe is borne shall not be forced to contribute to the charge, as long as the Mother lives, and the child be under 7. yeeres old.

24. Q. A man with his Wife and Children takes an house in one Parish, for a yeere: and before the end of his terme is unlawfully put out of possession, and after taketh part of an house, as an Inmate in another Parish, from whence hee is also put out, and thea not beeing able to get any dwelling, they come to lye in a Barne in a third Parish where the Husband falleth sick, and the Wife is delivered of another childe, where ought these to bee settled?

Resol. If a man or woman having house or habitation in one parish be thrust out, this is an illegall unsetling which the Law forbiddeth, for none must bee enforced to turne vagrant, and such one must bee returned to the place where hee or shee was last lawfully settled, and the Childe also borne in the time of this distracti-
on.

25. Q. Whether an apprentice put out by the Churchwardens, &c. according to the Sentence to a Master in another Parish, if his Master dye and leave no Executor or Administrator fit to keepe an apprentice or able to place him: Hee shall bee provided for in the parish where hee was apprentice or shall bee sent backe to the parish from whence hee was put out.

Resol. Servants and apprentices are by law setled in that parish, and if they become impo-
tent there, the parish must abide the adven-
ture,

tute after their terme or time of service be lawfully ended.

26. Q. What is accompted a lawfull settling in a parish, and what not?

Resol. This is too generall a question to receive a perfect answer to every particular case which may happen: but generally this is to bee observed, that the law unsetleth none who are lawfully settled; nor, permits it to be done by practice, or compulsion; and every one who is settled is a native householder, sojourner, an apprentice or servant for a moneth at the least, without a just complaint made to remove him or her, shall be held to be settled.

27. Q. A rogue is taken at C. and will not confess the place of his birth: neyther doth it appeare otherwise but that hee confesseth the last place of his habitation to be at S. hereupon he is whipped and sent to S. at his coming to S. the place of his birth is there knowne by some to be at W. and thereupon the rogue confesseth it to be so: whether he might without any new vagrancy be sent to W?

Resol. In this case it is fit to send such a rogue to the place of his birth: for this is but a mistaking and no legall settling.

28. Q. If an Indictment be preferred to the grand Jury of the quarter Sessions of the peace against one for murther, manslaughter, for robbery, felony, or Petilarceny, and ignoramus found therupon, whether the said Sessions may deliver the party by Proclamation or not?

Resol.

Resol. Not by Proclamation at all, but for petty Lacenyes, and other petty Fello-
nies; in discretion the Gaole may be delivered
of them.

29. *Q.* If a Constable be chosen and refuseth
to take his Oath, what shall be done, and whe-
ther a Constable may make a deputy, and by
what meanes?

Resol. The refusall or neglect to take oath in
such a case is a contempt worthy of punishment,
and thereupon to fine, and imprison him, and
the making of a deputy is rather by toleration,
then by law.

30. *Q.* If a Constable dye or remove out of
the parish where, &c. how is his place to be sup-
plied?

Resol. By the Lord of the Leete, if that
time fall neere, otherwise by the Sessions;
but if that bee too farre off, then by the next
Justices;

31. *Q.* If a poore weake man be chosen Con-
stable or Tything-man, and bee unfit for the
place, how may hee be removed, and a fit man
sworne in his roome?

Resol. The Justices of Peace must helpe
this, and if the Lord of the Leete have po-
wer to choose a Constable or Tything-man
and performe so ill, it is a just cause to seize his
liberty.

32. *Q.* If a Nurse-childe, a Scholler at a
Grammar-schoole, or in the Vniversity prove
to

to be impotent by Sicknesse, lamenesse, Lunacy, or discouery of Ideocy, &c. how such persons shall be disposed to the benefit of

Resol. A Nurse, childe, or a Scholler at the Grammar-schoole, or at the University, or persons sent to the Common grole, Hospital, or houses of Correction, are not to bee esteemed as persons to be settled there, more then Travellers in their Innes, but their setting is where their Parents are settled, and Children borne in common Gaoles, and Houses of correction, their parents being prisoners, are to be maintained at the charge of the County.

33. Qu. What proportion Parsonages, or Tithes shall beare to the taxation of the poore of the parish?

Resol. The Parson or Vicar presentative, shall according to the reasonable value of his Parsonage, having consideration to the just deductions.

34. Qu. Whethel for the placing the poore of the parish, not to bee removed by consent of the parish, these poore men may not bee placed as Inmates for a time?

Resol. They may by expresse words of the Statute of the 43. of Elizabeth.

35. Qu. If a parishioner or owner within a parish do bring into the parish without the consent of the Parish, a stranger of another parish, which is, or apparantly is like to bee burthensome unto the parish, how they may easse themselves?

Resol. By taxing such a one to the charge of the rates of the poore, not onely having respect to his ability or the land he occupies, but according to the damage and danger he bringeth to the parish by his folly.

36. *Qu.* For warding in the day-time, for apprehending of Rogues, whether the Constable may not enlarge it to a farther time?

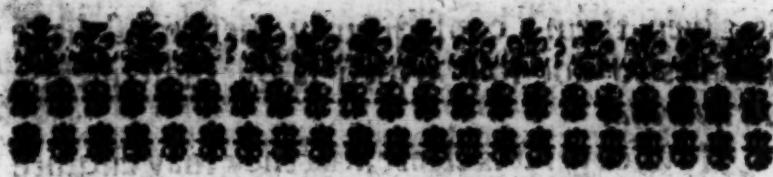
Resol. Warding in the day-time is of great use, and must bee left to the discretion of the Constables or direction of the Justices to vary according to the occasion.

37. *Qu.* Whether Alehouses ought to bee allowed only in thorow-fare Townes, and others in other places to bee restrained onely to sell to the poore out of doores.

Resol. The Justices shall doe very well to allow none but in places very fit for their situation and uses, and to moderate the number.

38. *Q.* A man for his quality otherwise fit to be a Constable, or of other Office of that nature, procures himselfe to bee the Kings servant extraordinary, and by that means would excuse himselfe to serve in the County?

Resol. A servant extraordinary may well performe his ordinary service in the Country according to his quality.



The Justices opinion touching the Commissions by
which the Justices sit at Newgate, and the
right to have and to hold the said Commissions.



THE Justices at Newgate sit by
virtue of two Commissions (viz.)

Gaole delivery and Oyer, and de-
termine.

By the Commission of Gaole
delivery they may try all prisoners in the Gaole
or by Bayle, or such as be condemned will render
themselves, generally for all Felonies: and al-
so for such other offences as are particularly as-
signed to them by Statute.

The Statute of 4. Elizabeth 3. Cap. 2, doth
give them power to receive Indictments
against Prisoners of such as are upon Bayle, and
to proceed to try the same (viz.) Indictments
taken before the Justices of the peace, and
by equity thereof all Indictments before coro-
ners, justices of the peace, or coroners, by their
Commission ad delibera-
tione. But they cannot take
Indictments as Justices of Gaole delivery, but
being Justices of the peace, they may take in-
dictments against prisoners, but not against
them that be at large, forasmuch as power

Anciently felo-
nies included
all trespasses,
therefore the
Justices of
Gaole delivery
have power to
hold plea of
trespasses a-
gainst them in
prison or upon
bayle to ren-
der themselves.

Mar. Dyer,
99. Justices of
Gaole delivery
hold pleas of
all appeals
of felony or
murder against
one in prison
by their gene-
rall Com; and
of appeals: so
by the same
reason to take
Indictments,

is given them, consequently they must have
measures to do so, which is by Indictments
1d reward.

Howsoever it is cleric, hat they may enquire
of many offences and take Indictments in such
cases where power by the Statute is given to
the Justices of Gaole delivery, in such cases
where they have authority by Law or Statute
there the tytle of Indictments is, that *Ad fac-
tum delibera-tionem tunc*, before the Commis-
sioners of Gaole delivery, I. S. was indicted, and
the record must be made up so.

And whereas by the Statute of 1. 2. 3.
Cap. 2. Indictments taken before Justices of
Peace, or Coroners, or any other commissioners
of Inquisitions, when the fruy of the Indictments
is returned taken, *Memorandum quod ad generali
Sessionem tunc*, before A, B, C, &c. Justices ad
passant in Cam, Middlesex or London, I. S. was in-
dicted, and then tryed before Justices of Gaole
delivery, and by vertue of the said Statute, In-
dictments taken before Justices of the peace of
London or Middlesex, are tryed before the Justi-
ces of Gaole delivery, but its 2d reward paid

The Commissioner of Oyer and Terminer is
~~Ad triuic, inquirend, audiend, & determinand.~~
They may enquire of all offences mentioned in
the Commission, altho' the offenders be at
large, but they cannot try Prisoners upon In-
dictments taken before any other then their-
elves, as the Justices of Gaole delivery may by
the

the aforesayd Statute, unless there bee a Spec-
ciall Commission made, as it was in the case of
the Earle of Leicester, mentioned in *Plow. Ch. 3. Mar. Bro.*
for the ordinary Commission of Oyer, and
terminer is ad inquirend. and send. & determinand.
therefore they cannot determine of things
unless they make enquiry first, and on the
other side also the Justices of Gaole delivery
may try Indictments taken before Justices of
the peace, yet if one indicted before Commis-
sioners of Oyer and Terminer, the Justices of
Gaole delivery cannot try the same, because
the Record of the Commission of Oyer and
Terminer are to bee returned in the Kings
Bench, 44. E. 3. 31.

The Commission and the Records of the
proceedings before the Justices of Gaole deli-
verie, are to bee returned to the Custos Rotu-
lor. of the County, when the same persons are
Justices of Gaole delivery, and of Oyer and
Terminer, they may sit the same day and place,
and enquire by the same Iarie, but the entry of
the Records must be severall, according as the
Indictment is.

At the Assizes in the Countrey, the Justices
have their severall power as the Justices of
Gaole delivery, Oyer and Terminer, and Justi-
ces of the peace.

But when the Records are made up, they
must bee according to the power they made elec-
tion to proceed upon.

This is the regular and legall course. But the Clerkes of the Assizes promiscuously make entry thereof, But if a Writ of Error bee brought, they must certifie according to Law, or else it will bee erroneous, and so upon a *Certiorari*.

The Sessions of London may bee begun at the Guild-hall, and then adjourned to Newgate, if some Indictments bee at Guild-hall, then those must bee so certified: if others at Newgate, then the adjournment must bee mentioned, and that the Indictment was then taken.

Note that the tryall of Indictments taken before Justices of the peace of London, can not bee tryed at Newgate, as in nature of a tryall before Justices of the peace at London, for many of the Commissioners, for Gaole delivery, are not Justices of the peace for London, but in such cases the tryall must be before the Justices of Gaole delivery: as upon Indictments taken before the Justices of the peace of London; as in the case of Indictments taken before the Justices of the peace of Middlesex.

But if Indictments at Newgate be originally taken before them, as Justices of Gaole delivery, then it is inquirable how the Jurie sworne, and impannelled to enquire at the Sessions of the peace for London, or Middlesex, doe serve to present Indictments before the

the Justices of Gaole delivery at Newgate, un-
lesse the custome and usage will warrant, the
two severall Juries, sworne at the Sessions of
the peace for London, or Middlesex, are also by
the same oath and impanelling to serve for the
grand Jury for the Commission of Gaole deli-
very, and Oyer, and Terminer.

Vpon conference with Mr. *Keeling*, and
the Clerkes for Newgate of London, and
Middlesex, and the Clerkes of Assizes, and
view of the severall Entries, a more ma-
ture and certaine resolution may bee given,
this being in hast, and without such con-
siderations as were requisite.

FINIS.

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